Supreme Court, U.S.
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No. 98-1837

IN THE
SUPREME COURT OF THE UNITED STATES

STEFAN DIETTRICH,
Petitioner,

v.

NORTHWEST AIRLINES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6.

Respondent Northwest Airlines, Inc. is wholly owned by its parent, Northwest Airlines Corporation.

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STATEMENT OF THE CASE

The court of appeals reversed the district court's denial of respondent's Rule 50 motion and overturned the jury verdict in this age discrimination case because it found the evidence to be insufficient to support a jury finding that respondent's explanations for its actions were pretextual. The court of appeals also rejected petitioner's request that it deny respondent's appeal as a sanction for a footnote in respondent's reply brief to the district court concerning the parties' post-trial jury interview. The court of appeals was not in a position to reverse the district court on the jury-interview sanction issue because the district court did not dismiss respondent's Rule 50 motion as a sanction for respondent's counsel's conduct. The district court had dismissed respondent's Rule 50 motion solely on its merits. Both the district court and court of appeals indicated that they did not rely on respondent's reply brief footnote reference to the jury interview when ruling on the merits of petitioner's age discrimination claim.

Respondent adopts the factual discussion contained in the court of appeals' decision as to the substance and merits of this case. The petition miscasts the trial as a credibility contest containing testimonial conflicts on material issues. Petition at 15, 24. There was no direct evidence of discrimination or alleged age-related remarks by decision makers or non-decision makers. Petitioner's case was based entirely on indirect circumstantial evidence which purported to show pretext, and was devoid of testimonial conflict on material issues, including respondent's reasons for its actions.

As to respondent's discussion of the post-trial jury interview, the petition misstates the holding in the district court and suggests incorrectly that the district court denied respondent's Rule 50 motion because of respondent's counsel's conduct and suggests incorrectly that the court of appeals abused its discretion in "reversing" the district court on this issue. In fact, although the district court stated that it **could** have denied the Rule 50 motion on this basis, it did not do so. The court of appeals likewise chose not to

uphold the jury verdict based on the conduct of respondent's attorneys before the district court. It did not have to "reverse" the district court on this issue.

The district court granted respondent's attorneys' request to interview the jury and the jury was interviewed by **both** parties' counsel at the same time. Respondent made no mention of the jury interview in its post-trial motions or its initial brief attacking the verdict in the district court. Petitioner's memorandum to the district court in opposition to respondent's Rule 50 motion, however, argued at page 7:

> [T]he jury may very well have **unanimously** decided Hinckley was lying. (Emphasis added.) Respondent's Appendix A at A-1.

As respondent explained to the court of appeals, respondent's counsel interpreted this comment as improperly reflecting discussions with the jury after trial, and felt it justified a response. Respondent's Appendix C at A-5 - A-6. As a result, respondent's counsel, in footnote 2 on page 6 of respondent's reply brief to the district court, stated:

> Northwest, frankly, is surprised at Diettrich's argument about Hinckley's credibility. With the permission of the Court and in accordance with Local Rule 8.07, the parties engaged in a post-verdict dialogue with the jury regarding the reasons for their verdict. The jury most certainly did not conclude that Hinckley lied. If Diettrich is suggesting to the Court that this jury did, the suggestion is both incorrect and improper. (Emphasis in original.) Respondent's Appendix B at A-2 - A-3.

That footnote was the only reference respondent's counsel made to the jury interview at the district court level and respondent's counsel at no time argued that the jury interview served as a basis to overturn the jury verdict. The petition's suggestion that respon-

dent's counsel "relied" on the interviews as a basis to overturn the jury verdict is incorrect. Petition at 12-17.

The district court read petitioner's characterization of what "the jury may well have unanimously decided" differently than respondent's counsel, rebuked respondent's counsel for its footnote, and, citing no authority, stated that the footnote, by itself, justified denying respondent's Rule 50 motion. The district court, however, did not dismiss respondent's motion for that reason. Instead, it considered the evidence and denied respondent's motion because it found that the jury had sufficient evidence from which to infer age discrimination:

> Northwest's reliance on its contact with jurors was improper and, by itself, justifies denying the motion for judgment as a matter of law.
>
> **Regardless**, Diettrich submitted enough evidence for a reasonable jury to find discrimination. (Emphasis added.) [Petitioner's App. C at 22a.]
>
> . . .
>
> The court denies the motion for judgment as a matter of law **because** the jury had sufficient evidence from which to infer age discrimination. (Emphasis added.) [Petitioner's App. C at 24a.]

Respondent did not mention the jury interview in its initial brief to the court of appeals and never argued that the district court's order should be reversed based on that jury interview. Rather, petitioner argued in his appellate brief that respondent's counsel's conduct justified denying the appeal. In response, respondent noted that the district court did not deny respondent's Rule 50 motion on this ground and neither should the court of appeals. Respondent further argued that petitioner had neither cited any authority which would justify the court of appeals to dismiss respondent's appeal as a sanction, nor offered any authority to show

that the district court itself had abused its discretion in choosing **not** to dismiss respondent's Rule 50 motion as a sanction. Respondent's Appendix C at A-6.

The court of appeals recognized that the district court had not denied respondent's Rule 50 motion on the basis of the reference to the jury interview. Instead, the court of appeals made clear that it was independently reviewing respondent's counsel's behavior to determine whether the court of appeals on its own should punish respondent by affirming the jury's verdict, given that the district court had not done so:

> . . . The district court appropriately **chastised** Northwest for its highly improper behavior.
>
> Diettrich argues that Northwest's misconduct was sufficiently grave that **this court** should punish Northwest by affirming the jury's verdict . . ..
>
> A number of reasons persuade us that affirmance of the jury verdict would not be the appropriate sanction here. Most importantly, Diettrich was not prejudiced by Northwest's misconduct. In evaluating Northwest's post-trial motions, the district court expressly stated that it would disregard Northwest's impermissible materials. **Based on permissible materials alone**, the court found that Diettrich submitted sufficient evidence to sustain the verdict. . . .
>
> . . .
>
> Our refusal to impose the sanction of affirming the jury's verdict does not mean that misconduct like Northwest's must go unpunished. . . . Although the district court has already considered this matter once, it may wish to reconsider its evaluation of the proper course of action in light of our decision

> that Northwest is entitled to judgment as a matter of law. . . . (Emphasis added.) [Petitioner's App. A at 6a-7a.]
>
> . . .
>
> . . .In this case an experienced jurist [the district court] decided **not** to proceed beyond his critical comments of counsel. ... (Emphasis added.) (Flaum, J., concurring) [Petitioner's App. A at 11a.]

After noting that the district court expressly stated that it would disregard respondent's counsel's comments concerning the jury interview, the court of appeals stated that its review of the district court's decision also would be untainted by the reference to the jury interview. [Petitioner's App. A at 6a-7a.]

REASONS FOR DENYING THE WRIT

This case presents no issue of national significance, is of interest solely to the parties involved and is a fact-based case. The sanction issue is merely hypothetical because the district court did not dismiss the Rule 50 motion as a sanction. The inherent authority of a district court to sanction misconduct is as well-settled as is a court of appeals' authority to review such a sanction for appropriateness. No issue worthy of review is presented. The Seventh Amendment issue raised in the petition also is well-settled and was waived by petitioner when he failed to argue it below. The Seventh Circuit already has recognized that substantial evidence of pretext is enough to support a jury verdict and additional evidence of discrimination is not required. This is not an appropriate case, therefore, to address any split among the circuits concerning this Court's "pretext-only" rule. Here, the court of appeals reviewed the record and found no substantial evidence of pretext sufficient to support the jury verdict. The petitioner failed to call any material conflicting testimony to the attention of the court of appeals. Reexamination by this Court of the decision below will result in nothing more than a reweighing of the evidence and the inferences to be drawn from it.

I. This case does not present the question of whether the district court had inherent power to deny respondent's Rule 50 motion as a sanction.

This case does not present any issue appropriate for the Court's exercise of discretionary jurisdiction. Noone disputes that in the proper case, a district court has the authority to deny a Rule 50 motion as a sanction and that a court of appeals has the authority to review whether the district properly exercised its authority in imposing such a sanction. No issue of national significance exists on these obvious points sufficient to justify granting the writ.

Furthermore, here, contrary to the petitioner's allegation, the district court did not deny respondent's motion for judgment as a matter of law due to respondent's counsel's alleged misconduct. Instead, the district court denied respondent's Rule 50 motion solely because it found the jury had sufficient evidence from which to infer age discrimination. Thus, by definition, the court of appeals could not have improperly reversed a determination by the district court to dismiss respondent's Rule 50 motion as a sanction, because the district court never made such a decision. The court of appeals correctly identified the applicable law, chose not to exercise its discretion to deny the appeal as a sanction for respondent's counsel's reference to the jury interview, and correctly reversed the district court on the merits of this fact-based case. Both the district court and the court of appeals made clear that respondent's counsel's reply brief footnote reference to the jury interview was not relied upon by either court in assessing the merits of this case.

Had the district court denied the Rule 50 motion as a sanction for respondent's counsel's reference to the jury interview, its action would have been an abuse of discretion for what essentially was a reference that was inconsistent with Federal Rule of Evidence 606(b). The petition suggests that respondent's counsel argued to the district court that the jury interview provided a basis to overturn the verdict. Respondent's counsel did not make such an argument. Further, the jury interview had not been conducted with

the intent to somehow use the information obtained as a basis to attack the jury verdict, as can be seen from the fact that the jury interview: (1) was not even mentioned in respondent's post-trial motion or initial supporting brief to the district court, and (2) was never raised as a basis to set aside the verdict either in the footnote in the reply brief to the district court or the footnote in the reply brief to the court of appeals.[1]

The district court, however, did not abuse its discretion and it is not surprising that it held no hearing on the sanction, because it did not dismiss respondent's Rule 50 motion as a sanction for misconduct. Thus, the district court's inherent power to exercise its discretion in a unique, rare case to dismiss a Rule 50 motion as a sanction for alleged misconduct simply is not implicated here. Even if it were implicated here, this case raises no issue of national importance and is not worthy of review. The question presented has already been decided and, because the district court did not dismiss as a sanction, the question involves at most a hypothetical application of law to fact.

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[1]There was no showing or finding of bad faith or fraud here and the district court held no hearing on the appropriateness of any sanction. This Court has made clear that a district court must exercise restraint and discretion before exercising the power to dismiss a case as a sanction, and the district court must comply with the mandates of due process, both in determining that the requisite bad faith conduct occurred and in assessing the sanction. Chambers v. NASCO, Inc., 501 U.S. 32, 43-44, 50 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764, 767 (1980).

Here, there would have been no reason for respondent to know that its counsel's passing reference in a reply brief footnote, would lead to dismissal of its Rule 50 motion. Respondent's counsel's conduct also was not such that would merit the extreme sanction of dismissal on respondent absent consideration by the district court of less severe sanctions and an explanation of why such sanctions would be inadequate for promoting the interests of justice. Because the district court made no such findings and held no hearing on whether respondent's counsel's conduct amounted to bad faith, or on the adequacy of possible lesser sanctions, it would have been an abuse of discretion for the district court to have dismissed respondent's Rule 50 motion in this case. This is particularly true because, as the court of appeals here held, respondent's counsel's conduct had no effect on the course of the litigation in light of the district court's assurance that it did not consider the jury interview information in reaching its decision. Chambers, 501 U.S. at 43-44, 50; Roadway Express, 447 U.S. at 764, 767; Barnhill v. United States, 11 F.3d. 1360, 1367-70 (7th Cir. 1993); English v. Cowell, 969 F.2d. 465, 472-73 (7th Cir. 1992).

II. This case raises no Seventh Amendment question and petitioner never raised the constitutional argument below.

For the first time, before this Court, petitioner argues that the Seventh Amendment would be violated were a court to reverse the jury verdict here, because, claims petitioner, this case turned on the credibility of respondent's decision maker. Even if this case did have constitutional overtones, petitioner never raised a constitutional argument to the district court or the court of appeals as a basis on which they allegedly should have upheld the jury verdict. Nor did petitioner suggest that they would be violating the Seventh Amendment if they failed to uphold the verdict. Petitioner should not now be allowed to raise the issue before this Court having failed to first give the lower courts an opportunity to consider it. "Ordinarily, this Court does not decide questions not raised or involved in the lower court." Youakim v. Miller, 425 U.S. 231, 234 (1976); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); Delta Airlines, Inc. v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not raised in court of appeals "is not properly before us").

Even if petitioner had preserved his constitutional argument, the petition raises no issue of national significance. The court of appeals overturned a jury verdict for insufficient evidence. There is nothing unique or surprising about such an occurrence and the law governing Rule 50 motions is well-settled. Review of the court of appeals' decision would merely entail a reweighing of the facts of this case and permissible inferences to be drawn from them. The petition mischaracterizes this case as one where there were material credibility resolutions for the jury to make and suggests that there was material conflicting testimony. However, petitioner failed to point out the allegedly material evidentiary and testimonial conflicts to the court of appeals, and none are pointed out here in the factual recitation in his petition for certiorari. The petitioner therefore has waived his right to do so now—it was not the job of the court of appeals to scour the record for evidentiary conflicts that petitioner failed to call to its attention. Carter v. American Oil Co., 139 F.3d 1158, 1162-63 (7th Cir. 1998).

Instead, the petition focuses on the standard question asked of respondent's decision maker, whether he would have taken a different action if everything else had been the same but petitioner had been younger. Here, the decision maker said he would have taken the same action even if petitioner had been younger. It is well settled that the jury's right to disbelieve this testimony cannot rise to constitutional levels, particularly where, as here, there was a total absence of credible evidence of pretext sufficient to support an ultimate finding of age discrimination. Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 575 (1985) (when reviewing a trial court's findings in the face of a Rule 52(a) motion, "the court of appeals may well find clear error even in a finding purportedly based on a credibility determination").

This same question and answer in similar form generally occurs in every discrimination trial. The Seventh Amendment simply is not implicated in every discrimination case where the decision maker takes the stand and denies discriminatory conduct or else there would have been no reason to have erected mechanisms such as summary judgment and judgment as a matter of law to take away from juries cases that present no material fact disputes, or for this Court to have developed a body of law concerning shifting burdens of production to weed out non-meritorious discrimination cases through summary judgment. Those tools would then serve no meaningful purpose. See Perfetti v. First Nat. Bank of Chicago, 950 F.2d 449, 452 (7th Cir. 1991). The court of appeals correctly determined there was no material credibility issue. This case has no constitutional implications. The only question this case presents is application of settled law to the specific facts of a garden variety age discrimination claim.

The court of appeals did not second guess the jury. Rather, it properly dismissed this case because it found insufficient evidence for the jury to conclude that respondent's stated reasons for its actions were pretextual. Where there is no substantial evidence of pretext, a jury verdict can be overturned without implicating the Seventh Amendment. Even if petitioner had presented a witness to contradict respondent's decision maker's explanation, the court of

appeals could have overturned the jury verdict if petitioner's witness' story was internally inconsistent or implausible on its face, despite any attempt by petitioner to insulate such a review by denominating the jury's decision as a credibility decision. Anderson, 470 U.S. at 575. Here, petitioner presented **no** witness to contradict respondent's explanation for its decision and there were **not** two competing witnesses' stories from which the jury had to choose, so there was no Seventh Amendment constraint facing the court of appeals as it analyzed the evidence. It is well settled that a party cannot meet its burden of proof "by relying on the hope that the jury will not trust the credibility of the witnesses.... There must be some affirmative evidence...." Wright & Miller, Federal Practice and Procedure: Civ.2d § 2527, at 288 (1995). Despite the opportunity of the jury (or trial court in a bench trial) to appraise the credibility of the witnesses, a reviewing court may overturn their findings when those findings cannot properly be supported. United States v. United States Gypsum Co., 333 U.S. 364, 396 (1948).

If reversal of the jury verdict here violates the Seventh Amendment, then it is difficult to imagine any case in which summary judgment or judgment as a matter of law for an employer could ever be appropriate. As the Seventh Circuit said in reversing a district court's denial of a Rule 50 motion in a similar case:

> If we could never reverse a jury verdict for the plaintiff in an 'unworthy of credence' claim on the ground of insufficiency of the evidence, then a district court could never grant summary judgment or a directed verdict for the employer; in every claim, the jury would have to be given its opportunity simply to disbelieve the employer. This result does not follow from [Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)] and would overrule the basic requirement that a jury verdict be supported by 'substantial' evidence. The purpose of Burdine was not to allow plaintiffs to go to the jury without presenting any evidence at all; its purpose was to allow plain-

> tiffs to prove discrimination without presenting any evidence of discrimination, and solely with evidence of pretext.

Perfetti, 950 F.2d at 452.

The Seventh Circuit is well aware that the Seventh Amendment places limitations on a court's power to reexamine a jury verdict. See, e.g., Latino v. Kaizer, 58 F.3d 310, 314 (7th Cir. 1995) (discussing those limitations). Here, the court of appeals acknowledged that if an evidentiary dispute had legitimately existed, that dispute could support the district court's decision to allow the jury verdict to stand. However, the court of appeals found no such dispute. Petitioner's App. A at 7a. Where the evidence is insufficient to support a jury verdict, a district court or court of appeals has the authority to step in and reverse the jury, even though an employee claims that an employer's stated reasons for its action are unworthy of credence:

> We note that in reviewing the sufficiency of the evidence in indirect discrimination cases, we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue simply because juries have the exclusive right to judge credibility. . . . If the evidence does not amply support a plaintiff's claim that the defendant's explanation is unworthy of credence, judgment as a matter of law is entirely appropriate.

Futrell v. J.I. Case, 38 F.3d 342, 346 (7th Cir. 1994) (citations omitted); accord, Rand v. CF Industries, Inc., 42 F.3d 1139, 1146-47 (7th Cir. 1994); Perfetti, 950 F.2d at 452. The law concerning the tension between the Seventh Amendment and Rule 50 is well-settled, the Seventh Circuit is well aware of that law and the court of appeals correctly followed it here. No question of national significance is raised by the petition.

III. The court of appeals' decision does not conflict with this Court's decisions and this case does not present an appropriate vehicle for resolution of any conflict among the circuits.

A three judge panel of the Seventh Circuit unanimously and correctly concluded that petitioner had failed to present sufficient evidence from which a jury could conclude that petitioner was discriminated against on the basis of his age. The petition misstates the court of appeals' holding in an attempt to create a non-existing conflict between that holding and this Court's decision in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-11 (1993). The petition incorrectly claims that instead of adopting a "pretext-only" rule, the court of appeals' decision requires more. To the contrary, the court of appeals recognized that proof of pretext would be enough to sustain the jury verdict. Here, the court of appeals reached its decision below not by requiring petitioner to prove more than "pretext," but rather by determining that petitioner failed to present sufficient evidence to demonstrate pretext. The court of appeals specifically distinguished this case from one of its earlier decisions in which there had been sufficient "evidence of pretext" to uphold the jury verdict:

> Diettrich likens his case to *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125 (7th Cir. 1997), in which this court upheld a jury finding of discrimination even though the evidence of **pretext** was "tenuous." (Emphasis added.) Petitioner's Appendix A at 9a-10a.

As discussed above in the prior section, this was a purely circumstantial indirect evidence case, with no material conflict of testimony sufficient to require a court to uphold a jury verdict. This case presents no conflict with Hicks because the court of appeals did not require petitioner to do anything more than prove pretext, which he failed to do. The court of appeals followed established precedent of this Court, and its decision turned upon the unique

facts of this case.[2] Thus, this case has no national importance.

This is not a case in which various witnesses told different stories about how respondent's decision maker conducted the interviews or about the criteria on which the decision maker relied. Thus, there was not any conflicting material evidence for the jury to weigh nor any material credibility resolution for the court of appeals to second guess. The court of appeals, therefore, correctly viewed this as a case where no reasonable jury could infer that respondent's stated reasons for its actions were pretextual. It concluded that the case should not even have been allowed to go to the jury in the first instance. Here, there were no witnesses who told a different story to the jury about how respondent made its decisions and there was no affirmative evidence to support a verdict for the petitioner.

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[2] In this case, respondent's decision maker testified that he administered job interviews to 12 candidates in what he believed was a permissible fashion. His testimony about what he did and why he did it was uncontradicted. Petitioner was the first candidate interviewed and received a slightly different interview than the other 11 candidates. However, the other 11 candidates all received similar interviews and all were successful, including the 51- and 52-year old candidates who were barely younger than the 53-year old petitioner. This evidence too was uncontradicted. Petitioner's expert's testimony that respondent could have constructed a better interview system and could have done a better job training respondent's decision maker to implement that system does not conflict with respondent's decision maker's testimony and creates no permissible inference that respondent's reasons for its decision concerning petitioner were pretextual, because respondent's "less than perfect" approach was applied to all the candidates including the successful 51- and 52-year olds. Respondent's decision maker could not have thought or known that those candidates were materially younger than the 53-year old petitioner because they were not. There is no evidence that respondent's decision maker implemented the interview process in a manner contrary to the direction he received from his superiors or inconsistently with how he sincerely believed the process was to be implemented. In suggesting otherwise, the district court incorrectly based its decision on testimony that it attributed to respondent's decision maker when, in fact, the testimony came from petitioner's expert and related to how the expert believed an interview "should" be conducted. Petitioner acknowledged that his "statistical" evidence was not statistically significant, the sample was too small to permit an inference of age discrimination, and the two other candidates over age 50 were successful. Petitioner's App. C at 23a.; Petitioner's App. A at 3a-4a, 8a-11a; trial transcript at 192, 193, 284, 287, 361-63, Respondent's Supplemental Appendix to Brief of Defendant-Appellant before the Seventh Circuit at App. 415, 416, 437, 438, 462-64.

As can be seen from the portion of the Perfetti decision, 950 F.2d at 452, quoted above in the prior section, the Seventh Circuit has given the same interpretation to Burdine (and thus Hicks) that petitioner wants given: "pretext only" need be shown, nothing more. Certiorari should be denied because a decision in this case turns solely upon an analysis of the particular facts involved and has no national importance. "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see Texas v. Mead, 465 U.S. 1041, 1041-43 (1984) (Stevens, J.); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

This case not only fails to raise an issue of national significance, it fails to raise a true conflict between the circuit courts of appeals. As the petition notes, the Seventh Circuit's view, adopting the "pretext-only" rule, is the view being put forward by the petitioner here. Petition at 23, 26-28. The court of appeals here made no analysis of the rationale for the "pretext-only" rule. Because the Seventh Circuit follows the "pretext-only" reasoning petitioner favors and neither Hicks nor Burdine are implicated here, a better vehicle to address the "pretext-only"/"pretext-plus" split would be a decision from another circuit contrary to the Seventh Circuit's rule, most likely in the context of a district court granting summary judgment against a plaintiff who offered evidence of "pretext-only."

Even if petitioner were correct that in his case, the Seventh Circuit applied a "pretext-plus" analysis, petitioner alleges, at most, a conflict between different panels of the court of appeals, a matter more appropriately settled through a re-hearing *en banc*. See Davis v. United States, 417 U.S. 333, 340 (1974) (noting that a petition for certiorari had been denied where there merely was a conflict between decisions rendered by different panels of the same court of appeals). Notably, petitioner failed to make any such request.

IV. The court of appeals' decision was correct.

Although the correctness of the result reached in the court of appeals is not expressly listed as a factor taken into consideration in granting certiorari under Supreme Court rules, it has in the past been considered relevant to the Court's determination of whether to grant certiorari. As indicated by Justice Stevens, "the Court seldom takes a case merely to reaffirm settled law...." Estelle v. Gamble, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting); see also Robert L. Stern et al., Supreme Court Practice, 193-95 (7th ed. 1993). Here, as discussed in footnote 2 above in the prior section, the court of appeals was correct in concluding that there was not sufficient evidence for this case to have gone to the jury nor for a reasonable jury to have concluded that respondent's explanation for its actions was pretextual.

CONCLUSION

For these reasons and the reasons stated by the court of appeals, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

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3. **Appendix C**
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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STEFAN DIETTRICH,
Plaintiff,

vs.

DIETTRICH'S MEMORANDUM OPPOSING NORTHWEST'S POST-VERDICT RULE 50(b) AND 59 MOTIONS

NORTHWEST AIRLINES, INC.,
Defendant.

CIVIL ACTION NO. 94C1066

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Northwest's brief at pp. 5-6 asserts the "undisputed" facts do not support a finding of intentional age discrimination. In this section of its brief, Northwest discusses Hinckley's evidence and testimony in a vacuum. Northwest states how Hinckley based his decisions, what he did not rely on, why he did not rely on certain things, his interviewing techniques, his scoring of the candidates, etc. However, the jury may very well have unanimously decided Hinckley was lying. ...

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STEFAN DIETTRICH,
Plaintiff,

Case No. 94-C-1066

v.

NORTHWEST AIRLINES, INC.,
Defendant.

REPLY BRIEF OF NORTHWEST AIRLINES, INC.

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[p. 6]

E. <u>There Is No Evidence In The Record To Support Diettrich's Argument That The Jury May Have Concluded That Hinckley Lied About His Reasons For Not Selecting Diettrich For A Management Sales Position</u>.

In the absence of sufficient evidence upon which a jury could reasonably and permissibly infer age discrimination in this case, Diettrich argues that the jury "may very well have unanimously decided Hinckley was lying."[2] However, Diettrich

[2]Northwest, frankly, is surprised at Diettrich's argument about Hinckley 's credibility. With the permission of the Court and in accordance with Local Rule 8.07, the parties engaged in a post-verdict dialogue with the jury regarding the reasons

for their verdict. The jury most certainly did not conclude that Hinckley lied. If Diettrich is suggesting to the Court that this jury did, the suggestion is both incorrect and improper.

[p. 7]

did not point to any evidence in the transcript to support his unfounded suggestion.

The Seventh Circuit has consistently found that it is not the job of the court to scour the record for evidence to support a litigant's claim. Hayes v. City of Urbana, Ill., 104 F.3d 102, 104 (7th Cir. 1997) (finding that a litigant who has an argument to make must advance it); Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago, 104 F.3d 1004, 1009 n.2 (7th Cir. 1997) (finding that parties bear the burden of identifying evidence in support of their arguments and trial courts are not obliged to scour the record to find factual disputes).

Although the Court cannot invade the province of the jury to determine credibility of a witness where evidence is sharply in conflict, there is no such conflicting evidence in this case. Latino v. Kaiser, 58 F.3d 310, 314 (7th Cir. 1995). Hinckley's testimony about how and why he selected account managers was not impeached at trial. Diettrich offered no rebuttal witnesses and pointed to no cross-examination to contradict Hinckley's testimony. Moreover, Diettrich presented no evidence to show that Hinckley did not honestly believe that Diettrich lacked the qualities needed to go forward in the new sales organization. Rand v. CF Industries, Inc., 42 F.3d 1139, 1145 (7th Cir. 1994) (the appropriate inquiry is not whether it made a wrong decision but rather whether the employer honestly believed the explanation it proffered for its actions).

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The U.S. Supreme Court, in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993), instructs that judgment for a plaintiff is not compelled by disbelief in an employers' reasons for taking an employment action; but that such disbelief, together with the elements of a prima facie case, permit a trier-of-fact to infer the ultimate fact of intentional discrimination. Such inferences, however, must be grounded on more than speculation. Rand, 42 F.3d at 1146. Here, Diettrich not only has failed to point to any evidence to support his argument that the jury **may** have found that Hinckley was lying, but he also has failed to call the Court's attention to any concrete evidence from which the jury could have reasonably and permissibly drawn an inference of age discrimination. Diettrich's argument, therefore, must fail.

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APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Case No. 97-2831

STEFAN DIETTRICH,
Plaintiff,

v.

NORTHWEST AIRLINES, INC.,
Defendant.

REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal From The United States District Court
For The Eastern District of Wisconsin
Case No. 94-C-1066
The Honorable John W. Reynolds, Presiding

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[p. 11]

Thus, Northwest's motion for judgment as a matter of law should be granted.[3]

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[3]Diettrich argues that Northwest's motion "must be denied" because of improper conduct. (Pl. Br., Sec. I, A at 12). In support, Diettrich cited Shepherd v.

American Broadcasting Companies, Inc., 62 F.3d 1469, 1475 (D.C. Cir. 1995), citing Chambers v. NASCO, Inc., 501 U.S. 32, 43-45 (1991) which state that courts have inherent power to sanction attorneys or parties for misconduct. (Pl. Br., Sec. I, A at 12-14). Here, Northwest interpreted a comment in Diettrich's brief to the district court as improperly reflecting discussions with the jury after trial. Northwest commented in a footnote that it was improper for Diettrich's counsel to imply that the jury had not believed Hinckley's testimony. (NW App. at 110-11). Judge Reynolds read Diettrich's comment differently, rebuked Northwest for its footnote and indicated the footnote, by itself, justified denying Northwest's motion for judgment as a matter of law. (NW App. at 111). Judge Reynolds, however, did not dismiss Northwest's motion for that reason. Instead, he considered the evidence and denied Northwest's motion because he found that the jury had sufficient evidence from which to infer age discrimination. (NW App. at 113). Diettrich cites no authority requiring this Court to dismiss Northwest's motion nor any evidence that Judge Reynolds abused his discretion in choosing not to do so. Thus, this Court should not dismiss Northwest's motion for misconduct either.

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